

**STATE OF DELAWARE  
PUBLIC EMPLOYMENT RELATIONS BOARD**

<b>RICHARD FLOWERS,</b>	:	
	:	
Charging Party,	:	
	:	<b>ULP No. 17-01-1093</b>
<b>v.</b>	:	
	:	<b>PROBABLE CAUSE DETERMINATION</b>
<b>STATE OF DELAWARE, DELAWARE</b>	:	<b>AND ORDER OF DISMISSAL</b>
<b>TRANSIT CORPORATION and AMALGAMATED</b>	:	
<b>TRANSIT UNION, LOCAL 842,</b>	:	
	:	
Respondent.	:	

**APPEARANCES**

Richard Flowers, *Charging Party, pro se*  
Aaron M. Shapiro, *SLREP/HRM/OMB, for DTC*  
Lillian Shavers, *President, ATU Local 842*

**BACKGROUND**

The State of Delaware, Department of Transportation, Delaware Transit Corporation (“DTC”) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”), 19 Del. C. Chapter 13 (1986). DTC is a respondent to this unfair labor practice charge.

The Amalgamated Transit Union (“ATU”) is an employee organization within the meaning of §1302(i) of the PERA. By and through its affiliated Local 842, the ATU is the exclusive bargaining representative of a unit of “all hourly-rated operating and maintenance employees” employed by DTC in New Castle County, within the meaning of §1302(j) of the PERA. ATU 842 is also a respondent to this Charge.

Richard Flowers (“Flowers”) is the Charging Party. He was employed by DTC as a Fixed Route Operator and was a public employee within the meaning of §1302(o). At all times relevant to this charge, Flowers was a member of the bargaining unit represented by the ATU Local 842 (“ATU”).

DTC and ATU Local 842 are parties to a collective bargaining agreement which had a term of September 1, 2013 – August 31, 2016, which was applicable at all times relevant to the processing of the Charge.

On January 10, 2017, Flowers filed this unfair labor practice charge with the Delaware Public Employment Relations Board (“PERB”) alleging that DTC and ATU had severally and collectively violated specific sections of 19 Del. C. §§1301(1) and (2), §§1303(1)-(4), §1304(a), §§1307(a)(1)-(6) and §§1307(b)(1), (2), (3), and (6), which state<sup>1</sup>:

§1301. Statement of policy

It is the declared policy of the State and the purpose of this chapter to promote harmonious and cooperative relationships between public employers and their employees and to protect the public by assuring the orderly and uninterrupted operations and functions of the public employer. These policies are best effectuated by:

- (1) Granting to public employees the right of organization and representation. **(ATU)**
- (2) Obliging public employers and public employee organizations which have been certified as representing their public employees to enter into collective bargaining negotiations with the willingness to resolve disputes relating to terms and conditions of employment and to reduce to writing any agreements reached through such negotiations. **(ATU and DTC)**

§1303. Public employee rights.

Public employees shall have the right to:

- (1) Organize, form, join or assist any employee organization except to the extent that such right may be affected by a collectively bargained agreement requiring the payment of a service fee as a condition of

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<sup>1</sup> The respondent(s) which Mr. Flowers alleges violated each specific statutory provision is identified in parentheses following each subsection.

employment. **(ATU and DTC)**

- (2) Negotiate collectively or grieve through representatives of their own choosing. **(ATU)**
- (3) Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the State. **(ATU and DTC)**
- (4) Be represented by their exclusive representative, if any, without discrimination. **(ATU and DTC)**

§ 1304. Employee organization as exclusive representative.

- (a) The employee organization designated or selected for the purpose of collective bargaining by the majority of employees in an appropriate collective bargaining unit shall be the exclusive representative of all the employees in the unit for such purpose and shall have the duty to represent all unit employees without discrimination. Where an exclusive representative has been certified, a public employer shall not bargain in regard to matters covered by this chapter with any employee, group of employees or other employee organization. **(ATU)**

§ 1307. Unfair labor practices.

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following **(DTC)**:
  - (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
  - (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
  - (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
  - (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint or has given information or testimony under this chapter.
  - (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.
  - (6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.
- (b) It is an unfair labor practice for a public employee or for an employee organization or its designated representative to do any of the following:

(ATU):

- (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
- (2) Refuse to bargain collectively in good faith with the public employer or its designated representative if the employee organization is an exclusive representative.
- (3) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.
- (6) Hinder or prevent, by threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment by any person, or interfere with the entrance to or egress from any place of employment.

Specifically, Mr. Flowers alleges he was unlawfully discharged on July 20, 2016

because:

The facts as outlined in the letter of discharge, pursuant to section 21 of our contract<sup>2</sup>, and after being sent to a DART<sup>3</sup> physical, and completing the exam, I was fired for and only for not signing this new, non-negotiated, all-encompassing and unlimited medical authorization form. This was done despite my demand for a third doctor to settle my fitness for work, to both the union and DART pursuant to section 21 of the CBA attached. This is a provision of the contract often challenged by DART, and up till *[sic]* now always successfully defended by the union... I was systematically lied to by DART by being told to sign this new, non-negotiated, unlimited, medical form under the penalty of discharge and the union despite

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<sup>2</sup> Section 21, Physical Examinations, of the 2013-2016 collective bargaining agreement between DTC and ATU 842 states:

Should a bargaining unit member be ordered by an official of the ADMINISTRATION to undergo a physical examination by a physician designated by the ADMINISTRATION, such member may be examined by another physician of his or her own selection. If the reports of both physicians do not agree, the member involved shall report the matter to the ADMINISTRATION and the UNION. If the ADMINISTRATION and the UNION do not agree as to the physical fitness of the member, he or she shall be required to undergo another examination and the two examining physicians will be requested to select a third physician and the decision of the majority shall be final as to the physical fitness of the Employee.

<sup>3</sup> Charging Party intermittently refers to his employer as DART (a sub-agency of DTC) and as DTC. By way of further explanation, the General Assembly created the Delaware Transit Corporation (DTC) in 1994 to manage and operate DART (Delaware Authority for Regional Transit) along with the Delaware Administration for Specialized Transportation (DAST), Delaware Railroad Administration, and Commuter Services Administration. DTC operates DART statewide bus services.

fighting multicable *[sic]* PERB charges for non-negotiated work rules has not only let this happen to me and only me, they have also allow *[sic]* a discharge, for dart failing me on a medical exam, or non-failing *[sic]* me but refusing to provide a result to that exam that they order *[sic]*, and ignoring my demand for a third doctor, pursuant to section 21 of the CBA.

The union has successfully and always defended all other members in the past. Further, in a recent unemployment hearing, where this discharge was determined to be not for just cause/willful misconduct, DART manager testified under oath, the following, I was not allow *[sic]* to return to work because I would not give a list of all medication I was on, I did not fail a drug test or a fitness for work physical, was not there for, and did not take a CDL medical exam, but was still denied work for not agreeing to sign this form, a requirement, that is being applied to me alone. This is the very test *[sic]* book definition of discrimination and retaliation for my filing action in PERB against the respondents. *Charge ¶4.*

Flowers requests “full reinstatement and back wages, an end to the use of this new medical form, the enforcement of section 21 of the contract, and other action as PERB seem *[sic]* just to prevent this kind of abuse in the future.”

On January 19, 2017, DTC filed its Answer to the Charge denying the material allegations set forth therein. DTC asserts Article 21 of the negotiated agreement does not permit an employee to refuse to authorize release and review of his medical records without consequence. Under New Matter, DTC asserts the Charge fails to state a claim for which relief may be granted; and that the Charge is untimely because Flowers first noted his objections to signing the medical release form on January 20, 2016, more than 350 days before this Charge was filed.

Flowers filed his response to DTC’s New Matter on February 1, 2017, in which he denied the contentions therein, and also alleged a violation of HIPAA<sup>4</sup> rights. He also asserted in his Response:

When I was given this new, non-negotiated, form and informed it was to be used to get all medical information from all my doctors as

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<sup>4</sup> The Charging Party mistakenly refers to “HIPPA”; the proper reference is to the Health Insurance Portability and Affordability Act, “HIPAA.”

well as all medication, I refused to sign this form, as it violated my rights under HIPPA [sic]. DART and Its doctors at omega [sic] have every right to see information regarding my workmen's comp [sic] and have been given that documentation. Further the law say [sic] they didn't even need a release form for that, but they do need one for the information that they were trying to illegally get and I exercised my right in refusing to give them under HIPPA [sic]. A list of all my doctors, medical files and medication is **NOT** ... I attempted to exercise my rights under 164.552 of HIPPA [sic], and was then fired, undisputedly for not signing this form that violated my HIPPA [sic] rights. DART and the doctor(s) at omega [sic] broke the law! It is unlawful under HIPPA [sic] to demand as a condition of employment the release of confidential medical record [sic], then discharge an employee for failing to allow the respondent to break the law under 45 C.F.R. 164.522.

On January 23, 2017, ATU filed its Answer to the Charge denying the material allegations set forth therein. ATU also argued that Section 21 of the CBA is inapplicable in this case because DTC's physician was unable to complete the return to duty examination because Flowers refused to cooperate. ATU also denies that it is a new procedure for bargaining unit members to be required to sign a medical release as part of the Return to Work exam. Under New Matter, ATU asserts that the Charge fails to state a claim for which relief can be granted and that the Charge is untimely, for the same reasons asserted by DTC.

Flowers filed his response to ATU's New Matter on February 1, 2017, in which he denied the new matter contained therein. Flowers appended to his response documents which indicate ATU represented him in the grieving of his termination. Flowers also makes the same assertion about a violation of his HIPAA rights. He alleges he was:

cleared by my doctor, and was not cleared by DTC doctor at omega [sic] after completing the RTW [Return to Work] physical for failing to sign this form, which was to be used with all doctors of mine, and to secure a list of all medications without exception, making it clear the intent of this undisputed new form was to get any and all medical information of mine, without exception, including information having nothing to do with my employment in any way, or legally/contractually required to be disclosed.

Flowers concludes his responses to the new matter contained in the answers of DTC and the ATU with a similar threat:

This information, (the unlawful demand for a list of all doctor medical record [sic] and medications is not and never being [sic] by past practice at DART and omega [sic], or by statues [sic] **authorized and to the extent necessary or required by state or other law, for workmen compensation [sic] and or RTW exam's [sic] and you dam [sic] well know it!!**

I am going to sue DART and the doctors at omega [sic], and ATU, and I am going to have Joe Poli publish this law suit in his e mail dispatch to get all the state employees who this is being done to join us in the suit and go class action, then I am going to publish to the entire general assembly you stated this and it could have been fixed for almost nothing, but you again cost the state a fortune....  
(emphasis in original)

This probable cause determination is based upon a review of the pleadings<sup>5</sup> submitted in this matter.

### **DISCUSSION**

Rule 5.6 of the Rules and Regulations of the Delaware Public Employment Relations Board provides:

- (a) Upon review of the Complaint, the Answer and the Response, the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred. If the Executive Director determines that there is no probable cause to believe that an unfair labor practice has occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with provisions set forth in Regulation 7.4. The Board will decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.
- (b) If the Executive Director determines that an unfair labor practice has, or may have occurred, he shall, where possible, issue a decision based upon the pleadings; otherwise he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

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<sup>5</sup> In addition to the pleadings, Mr. Flowers provided to PERB copies of audio recordings from an Unemployment Appeals Referee hearing on March 2, 2016 and from a full Unemployment Appeals panel hearing on June 22, 2016. The audio recordings of the unemployment hearings are immaterial to the consideration of this Charge under the PERA and were not considered in reaching this decision.

For purposes of reviewing the pleadings to determine whether probable cause exists to support the charge, factual disputes revealed by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing a valid charge without the benefit of receiving evidence in order to resolve factual differences. *Flowers v. DART/DTC*, ULP 04-10-453, V PERB 3179, 3182 (Probable Cause Determination, 2004).

The PERA requires a Charging Party to allege facts in the complaint with sufficient specificity so as to first, allow the Respondent(s) to provide an appropriate answer and second, to provide facts on which the PERB can conclude there is a sufficient basis on which to continue to process the charge. The Charge must also explicitly link the factual allegations to the specific statutory provisions alleged to have been violated. The burden initially rests on the Charging Party to provide facts which support the charges. *Sonja Taylor-Bray v. DSCYF*, ULP 09-11-716, VIII PERB 4633, 4636 (2010).

Mr. Flowers appended to his Charge the July 20, 2016 letter of dismissal which states:

As you know, on Thursday, July 7, 2016, a pretermination hearing was held for you at Delaware Transit Corporation's (DTC) Beech Street facility. The following people were present at the hearing: Andrew Markovitz, DTC Labor Relations Manager; David Flowers, Chief Transportation Supervisor, North; Lillian Shavers, President, ATU Local 842; Timothy Lawrence, Shop Steward, ATU Local 842; Larry Vaughan, Chief Transportation Supervisor, North, serving as the hearing officer; and you.

Discussed during this hearing was your absence since September 16, 2015, from your position as a Fixed Route Operator. On January 11, 2016, you contacted the New Castle County Fixed Route Control Center requesting to be put back on the work schedule. You were informed by Charles D. Moulds, Director of Fixed Route Operations, that medical clearance from your treating health providers was required in order to set up a Return to Work Physical and Drug Screen (according to DTC Policy) since you were out of service over 30 calendar days. After receiving the medical clearances from your treating providers, a Return to Work Physical and Drug Screen was scheduled for January 20, 2016.



Dr. Janicia Thomas, MD at Omega Medical Center, Newark, Delaware, examined you. She required additional information from your treating health providers prior to clearing you to return to work. You refused to sign the Omega Medical Center Medical Records Release form at the time of your physical, and your refusal prevented Dr. Thomas from accessing the required information she needed to determine your fitness and ability to return to work.

Since failing to receive a release to return to work from your examination on January 20, more than once you requested to be placed back on the schedule. Multiple DTC administrators including Kathy Wilson, Deputy Chief Operations Officer; Charles Moulds; Andrew Markovitz; and Diana Farrell, Benefits Administrator; informed you that you must be cleared to return to work by Dr. Thomas prior to returning to work. As of this date, you have not complied with the request from Dr. Thomas to release your medical information from your treating medical providers, thus she is unable to determine your fitness and ability to return to work.

As you are aware, Fixed Route Operators perform a vital and essential function, and your actions directly impact our ability to serve the public. Your continued absence from work and your continued refusal to complete required forms cannot and will not be tolerated. DTC reviews each case on its own merit. After reviewing your case it is the decision, due to your actions, that your employment be terminated. Accordingly, this letter is DTC's official notification that your employment is terminated effective the date of this letter. *Charge, Exhibit 1.*

The letter was issued by DTC Chief Executive Officer, John T. Sisson. Mr. Flowers does not dispute the dates or the chronology of events DTC sets forth in the termination letter.

Mr. Flowers alleges he was terminated "for and only for not signing this new, non-negotiated, all-encompassing and unlimited medical authorization form." The July 20, 2016 letter states he was terminated for "continued absence from work and ... continued refusal to complete required forms." DTC asserts Mr. Flowers' return to work medical evaluation could not be completed by its physician until a review of his medical records was conducted, which required him to complete the medical authorization form. It also asserts that its provider, Omega, completes between 90 and 100 return to work physicals annually, all of which require the affected employees

to complete and submit medical records release forms. Both DTC and the ATU asserted bargaining unit employees have been required to sign medical record release forms as part of the medical certification process for many years, and that the content of these forms has never been negotiated.

It is undisputed that the collective bargaining agreement between DTC and ATU 842 states in Article I, Section 9, Discipline: “A. No employee shall be discharged or disciplined without just cause.” Whether or not there was just cause for Mr. Flowers’ termination is a question which arises under the collectively bargained agreement. *Flowers v. DTC*, ULP 04-10-453, V PERB 3447, 3468 (2005). Mr. Flowers has been repeatedly advised through PERB decisions and by the full PERB during a hearing on an appeal of a prior decision that the unfair labor practice process is not a substitute for the contractually negotiated grievance procedure. Complaints which raise a question as to whether a contractual right (such as just cause for termination) has been appropriately and fairly applied must be processed through the grievance procedure. *Flowers v. DTC*, ULP 14-06-958, VII PERB 6197, 6200 (2014).

Mr. Flowers also asserts he was discharged in violation of 19 Del.C. §1307(a)(1), (2), (3), and (4), based upon his asserted involvement in numerous actions involving him and other DTC employees which he listed in Attachments 2 and 3 to Exhibit 5 of his Charge (as well as in various other attachments to the Charge). Other than the cases in which he was the Charging Party, no support is provided to establish his alleged involvement in any of the listed actions. It is noted that the statute protects “concerted activities for the purpose of collective bargaining or other mutual aid or protection...” 19 Del.C. §1303(3). As stated in the National Labor Relations Board’s opinion in *NLRB v. Meyers Industries, Inc.*, “... it is the protection for joint employee action which lies at the heart of the Act.” 281 NLRB 118 (1986). If Mr. Flowers has engaged in concerted activity, it is his burden to establish what that activity was, with whom or on whose knowing behalf he was acting, and that his employer had knowledge (or reasonably should have known) that he

was engaging in such activity. *Flowers v. DTC*, ULP 04-10-457, V PERB 3447, 3466 (2005). A listing of actions in which he was not a named party, under the heading of “charges that I have worked on/advised/testified” does not provide a sufficient basis on which it might be concluded that he was engaged in concerted activity.

For these reasons, the pleadings are insufficient to support a finding of probable cause to believe that Mr. Flowers may have been engaged in concerted activities which rise to the level of being protected by the PERA. Consequently, the charges that DTC has violated 19 Del.C. §1307(a)(1), (2), (3) and/or (4) are dismissed.

Section 1308(a) of the PERA states, “...no complaint shall issue based on any unfair labor practice occurring more than 180 days prior to the filing of the charge with the Board.” PERB Rule 5, Unfair Labor Practice Proceedings, provides, in relevant part:

#### 5.2. Filing of Charges

(a) A public employer, labor organization and/or one or more employees may file a complaint alleging a violation of 14 Del.C. §4007, 19 Del.C. §1607, or 19 Del.C. §1307. Such complaints must be filed within one hundred-eighty (180) days of the alleged violation. This limitation shall not be construed to prohibit introduction of evidence of conduct or activity occurring outside the statutory period, provided the Board or its agent finds it relevant to the question of commission of an unfair labor practice within the limitations period.

Mr. Flowers filed his Charge on January 10, 2017, nearly a year after he was first requested to complete the medical records release authorization and placed on notice that the release and receipt of the required medical information – from his health providers to DTC’s physician – was required in order for DTC’s physician to complete his Return to Work Physical and Drug Screen.

Consequently, all claims which relate to Mr. Flowers’ allegations that DTC and/or ATU Local 842 violated the PERA by failing or refusing to negotiate or by unilaterally adopting a policy

requiring the release of medical records<sup>6</sup> are not timely filed, and are therefore, dismissed with prejudice, because they were not timely filed.

Further, claims which related to the direct application and interpretation of the Health Insurance Portability and Accountability Act (HIPAA) are not within the jurisdiction of the PERB. The U.S. Department of Health and Human Services is responsible to create and implement rules for the use and dissemination of protected health information. The HIPAA Privacy Rule regulates the use and disclosure of an individual's protected healthcare information by "covered entities," *e.g.*, healthcare clearinghouses, employer-sponsored health plans, health insurers and medical service providers. If Mr. Flowers believes that his HIPAA rights were impugned, his avenue of relief is not before the PERB.

Mr. Flowers also asserts that DTC violated Article 21 of the negotiated agreement and that ATU Local 842 failed or refused to support him in challenging the application of this contractual provision. This assertion is based on Mr. Flowers' conclusion that he was entitled to demand a third doctor review his fitness to return to duty. If his asserted right exists, it exists as a matter of application and interpretation of Article 21 of the collective bargaining agreement. Any contractual right he believed he had would have come into existence between January 20 and July 7, 2016, the date on which his pretermination hearing was held. Similarly, any claim that the ATU failed or refused to provide representation to him in pursuing a challenge to the application or interpretation of Article 21, would have come into existence during this same time period. The present Charge was filed nearly six months after his asserted claim of impropriety under Article 21. These charges are, therefore, also dismissed because they are untimely.

Finally, Mr. Flowers' assertion that he could only raise a concern about the proper application of Article 21 after he was disciplined, is without bases in law. There has never been a

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<sup>6</sup> 19 Del.C. §1307(a)(5) and (6) and §1307(b)(1), (2), (3), and (6).

“long standing history of PERB” to allow challenges to any provision “only after discipline is issued.” In his response to the ATU’s new matter, Mr. Flowers extrapolates that the ATU “is now saying as soon as a suspect *[sic]* violation occurs we are to run to PERB and not make to *[sic]* attempt to settle this, pursuant to PERA.” Flowers draws an erroneous conclusion. If a suspected violation of the collective bargaining agreement occurs, the proper avenue of recourse is to file a timely grievance as set forth in Article I, Section 9 of the negotiated collective bargaining agreement between DTC and ATU Local 842.

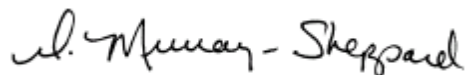
### **DETERMINATION**

Considered in a light most favorable to the Charging Party, the Charge, on its face, is untimely and fails to establish probable cause to believe that the Delaware Transit Corporation may have engaged in conduct which constituted an unfair labor practices in violation of the PERA, as alleged.

Further, considered in a light most favorable to the Charging Party, the Charge, on its face, is untimely and fails to establish probable cause to believe that ATU Local 842 may have engaged in conduct which constituted unfair labor practices in violation of the PERA, as alleged.

WHEREFORE, the Charge is dismissed in its entirety, with prejudice, for failing to state a legitimate claim under the Public Employment Relations Act.

DATE: April 18, 2017



DEBORAH L. MURRAY-SHEPPARD  
Executive Director  
Del. Public Employment Relations Bd.